RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are the three collaborating organizations in the nationwide Defending Immigrants Partnership, established to ensure that immigrants receive correct advice regarding the immigration consequences of criminal convictions. Additionally, amici are among the nation's leading experts on the intersection between immigration and criminal law, and thus have an interest in clear and fair rules for defining deportable conduct.

The Immigrant Defense Project ("IDP") is a nonprofit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted amicus curiae briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Luna Torres* v. *Lynch*, 136 S. Ct. 1619 (2016); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015); *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010); *Lopez* v. *Gonzales*, 549 U.S. 47 (2006); *Leocal* v.

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

Ashcroft, 543 U.S. 1 (2004); *INS* v. *St. Cyr*, 533 U.S. 289, 322-323 (2001) (citing IDP brief).

The Immigrant Legal Resource Center ("ILRC") is a national nonprofit resource center whose mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. The ILRC has a direct interest in this case because ILRC advocates for greater rights for noncitizens accused or convicted of crimes. Each year ILRC provides assistance to hundreds of attorneys defending noncitizens in criminal prosecutions and removal proceedings throughout the Ninth Circuit and nationally.

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a national nonprofit organization that provides legal and technical support to attorneys, legal workers, immigrant communities, and advocates seeking to advance the rights of noncitizens. For 30 years, the NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct and authored *Immigration Law and Crimes* and four other treatises published by Thompson-Reuters. The NIPNLG also has participated as amicus curiae in significant immigration-related cases in the federal courts, including before this Court in, among others: *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Luna Torres* v. *Lynch*, 136 S. Ct. 1619 (2016); *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015); and *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012). Because the NIPNLG has substantial expertise in the issue presented here, having submitted a brief as amicus curiae in the court of appeals in this case, it presents this brief to assist the Court in its consideration of this case.

SUMMARY OF ARGUMENT

As this Court has made clear in a line of cases tracing back to *Taylor* v. *United States*, 495 U.S. 575 (1990), federal statutes that assign criminal or immigration consequences to state convictions are presumed to have adopted a uniform federal definition of the named offense. Discerning that definition may present a complicated exercise in some cases, when the Court must determine the modal elements of the offense of conviction across the fifty States. *See, e.g.*, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186 (2007).

Here, however, there is a "readily apparent" federal definition of the offense. *Taylor*, 495 U.S. at 580-581. Congress first codified a federal crime of "sexual abuse of a minor" in 1986. Ten years later, just as it was considering amendments to that statute, it made "sexual abuse of a minor" a deportable offense. Under elemental canons of statutory construction, Congress's simultaneous consideration of these two laws, using precisely the same term, strongly counsels in favor of interpreting the two provisions to carry the same meaning of "minor," and to proscribe the same conduct, across the federal criminal and immigration laws.

In addition to being faithful to congressional intent, interpreting the Immigration and Nationality Act's "sexual abuse of a minor" provision to refer to the federal criminal law allays the significant constitutional concerns raised by the Board of Immigration Appeals' rudderless approach of evaluating state statutes of conviction on a case-by-case basis, using an inapposite federal victim-protection statute, 18 U.S.C. § 3509, as a mere "guide" for its inquiry. While the BIA's approach provides those charged with or convicted of potentially covered offenses with virtually no indication of whether

they will be deportable and ineligible for relief, the approach urged here provides constitutionally sufficient notice both of the relevant age limits and of the specific forms of prohibited sexual conduct.

ARGUMENT

I. CONGRESS CLEARLY DEFINED THE AGE LIMITS AND OTHER ELEMENTS OF THE CRIME OF "SEXUAL ABUSE OF A MINOR"

When applying the aggravated-felony provisions of the Immigration and Nationality Act ("INA") to convictions for state crimes, this Court seeks to discern whether the state offense categorically satisfies the "'uniform' federal definition" of the listed offense. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1693 n.11 (2013); *see also Nijhawan* v. *Holder*, 557 U.S. 29, 37 (2009) (describing "sexual abuse of a minor" as subject to this analysis (citing *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc)). The Court applies a variety of approaches to determine the uniform federal definition. In some cases, that definition can be found "in 'the generic sense in which the term is now used in the criminal codes of most States.'" *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186 (2007). Where, however, there is a "readily apparent" federal definition of the offense, the Court will apply it. *Taylor* v. *United States*, 495 U.S. 575, 580-581 (1990).

This is such a case. *See Estrada-Espinoza*, 546 F.3d at 1152 (finding it "unnecessary to survey current criminal law to ascertain a federal definition [for "sexual abuse of a minor" as used in the INA] because Congress has already supplied it"). As the text of the provision suggests and the legislative history confirms, Congress intended the phrase "sexual abuse of a

minor" in 8 U.S.C. § 1101(a)(43)(A) to refer to the offense of the same name described in the Sexual Abuse Act of 1986, as amended in 1996, the very year "sexual abuse of a minor" was added as an aggravated felony to the immigration statute.

A. Congress Defined "Sexual Abuse Of A Minor" In The Sexual Abuse Act Of 1986

The Sexual Abuse Act of 1986 enacted a broad federal prohibition on a range of sexual offenses occurring in areas of federal jurisdiction, from those involving "sexual acts" with minors to consensual sexual contact through clothing. *See* Pub. L. No. 99-646, § 87(b), 100 Stat. 3592, 3621.

As originally enacted, the statute criminalized sexual abuse specifically involving minors in two sections: 18 U.S.C. § 2241(c) (1986), entitled "Aggravated sexual abuse ... with children," proscribed engaging in a "sexual act" with a person under the age of 12, in areas of federal jurisdiction; § 2243(a) (1986), entitled "Sexual abuse of a minor," proscribed engaging in a "sexual act" in areas of federal jurisdiction with a person at least 12 but less than 16 years old if the perpetrator was at least four years older than the victim. In the same statute, Congress also proscribed "sexual abuse," not limited to minor victims, § 2242 (1986), and "[a]busive sexual contact," § 2244 (1986), which reaches less serious sexual conduct such as contact through clothing, § 2245 (1986) (defining "sexual contact").

By enacting for the first time a federal crime of "sexual abuse of a minor," the Sexual Abuse Act of 1986 elaborated the federal criminal regime relevant to this case. Two points about this framework bear noting here.

First, consistent with the Act's purpose of criminalizing "sexual act[s] involving a minor less than 16 years old," H.R. Rep. No. 99-594, at 17 (1986), Congress defined "minors" for purposes of federal sexual abuse law as victims under 16, in one instance with a four-year age disparity between the victim and the perpetrator, *see* §§ 2241(c), 2243(a) (1986). Nothing in the statute or legislative history suggests Congress intended federal sexual abuse law to reach victims 16 or older.

Second, Congress marked a meaningful distinction between sexual "abuse" and lesser forms of sexual "contact." While the three provisions criminalizing forms of "sexual abuse" proscribed "sexual acts," such as oral, anal, or vaginal penetration or direct touching, *see* §§ 2241, 2242, 2243, 2245(2) (1986), the fourth provision, criminalizing "abusive sexual contact," went further, proscribing, among other things, consensual sexual touching through clothing, *see* §§ 2244(a)(3), 2245(3) (1986). In other words, not every form of touching was, in Congress's view, a form of sexual abuse for federal criminal purposes.

B. IIRIRA Amended The INA To Adopt The Federal Criminal Definition Of "Sexual Abuse Of A Minor"

As originally enacted and amended for over 30 years, the INA did not treat "sexual abuse of a minor" or even child abuse (sexual or otherwise) as either an independent ground for deportability, which would trigger deportation with the possibility of relief for those who qualify, or an aggravated felony, which would mandate deportation without the possibility of

relief.[2] In 1996, however, Congress amended the INA by enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which was intended, among other things, to provide immigration consequences for "child abuse and sexual abuse." 142 Cong. Rec. 10,067 (1996) (statement of Sen. Dole). As in *Taylor*, it is "helpful to review the background" of the relevant provisions of IIRIRA, 495 U.S. at 581, because they make clear that Congress intended the aggravated felony of "sexual abuse of a minor" to be described by the offense as defined in the Sexual Abuse Act of 1986, as amended by the Amber Hagerman Child Protection Act of 1996, which Congress considered and passed simultaneously with IIRIRA.

Senators Dole and Coverdell offered an amendment to the Senate version of H.R. 2202, the bill that would eventually become IIRIRA. The amendment provided new deportability grounds for any noncitizen convicted of a broad range of domestic and sexual violence offenses targeted at adults and minors, including, among others, domestic violence, stalking, child abuse, and child sexual abuse or "sexual violence" crimes such as "aggravated sexual abuse, sexual abuse, [and] abusive sexual contact." 142 Cong. Rec. 8729 (1996); H.R. 2202 (Sen.) (May 2, 1996) (adopting Dole-Coverdell amendment); 142 Cong. Rec. 10,067 (statement of Sen. Dole) ("I am particularly pleased

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[2] During that period, Congress likely assumed that such offenses would be deportable under the existing category of "crime involving moral turpitude." *See* 142 Cong. Rec. 8706 (1996) (statement of Sen. Coverdell) (acknowledging that a crime like "child sexual abuse" may be, but is not necessarily, deportable as a "crime of moral turpitude"); *see also Castle* v. *INS*, 541 F.2d 1064, 1065-1066 (4th Cir. 1976) ("carnal knowledge" of a 15-year-old is a crime involving moral turpitude).

that the Senate adopted the Dole-Coverdell amendment .... Under the Dole-Coverdell amendment, violations of domestic violence, stalking, child abuse laws, and crimes of sexual violence have been added as deportable offenses."). As is apparent from the bill's text, it drew the operative definition of covered sexual crimes from the Sexual Abuse Act of 1986, proposing to establish as grounds for deportation conduct that involved victims of all ages and encompassed both "sexual abuse" and less serious "sexual contact," namely as defined in 18 U.S.C. § 2241 ("Aggravated sexual abuse"), § 2242 ("Sexual abuse") and § 2244 ("Abusive sexual contact"). The amendment did not designate any crimes as aggravated felonies that would bar relief.

At conference, however, Congress amended the bill to more carefully calibrate the immigration consequences of different crimes of sexual violence. Important here, Congress made the crime of "sexual abuse of a minor" an "aggravated felony" for purposes of 8 U.S.C. § 1101(a)(43)(A). IIRIRA, Pub. L. No. 104-208, § 321(a)(1), 110 Stat. 3009, 3009-627 (1996) (amending § 1101(a)(43)(A)). As a result, noncitizens convicted of "sexual abuse of a minor" would be "deportable and ineligible for most forms of immigration benefits or relief from deportation." H.R. Rep. No. 104-828, at 228 (1996) (conf. rep.). But Congress deleted the references to the other specific sexual offenses set forth in the Sexual Abuse Act of 1986. Where those offenses correlated to lesser crimes, they remained covered by the offense "child abuse," *see, e.g.*, *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 510 (B.I.A. 2008) (concluding that the deportability ground of "crime of child abuse" includes sexual abuse or exploitation), which Congress deliberately left as

grounds for deportation with the possibility of relief, along with domestic violence and stalking. H.R. Rep. No. 104-828, at 228.

In other words, Congress singled out for particularly harsh treatment a group of offenses corresponding directly to a federal criminal prohibition—§ 2243(a) as defined in 1996—at the same time as it provided for less harsh immigration consequences for another group of offenses targeting other, lesser forms of criminal conduct directed at children.

The express reference, and harsher consequences assigned, to the offense of "sexual abuse of a minor" were far from happenstance. At the very same time Congress was considering the amendments to IIRIRA that defined sexual abuse of a minor as an aggravated felony, it was also considering revisions to the statutory definitions of the corresponding federal crimes that broadened the federal prohibition and harshened the associated penalties.

In revisions proposed through the Amber Hagerman Child Protection Act of 1996, which was enacted as part of the same omnibus law that contained IIRIRA, *see* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 121, 321, 110 Stat. 3009, 3009-31, 3009-627 (1996), Congress amended 18 U.S.C. § 2243(a) to make explicit that "sexual abuse of a minor" reached victims *both* younger than 12 years of age *and* at least 12 but less than 16 where the perpetrator is at least four years older. H.R. Rep. No. 104-863, at 33, 802-803 (1996) (conf. rep.). As discussed above, *see supra* p. 5, § 2241(c) and § 2243(a) as originally enacted had covered complementary age ranges: § 2241(c) punished sexual acts with a victim

"who has not attained the age of 12 years," and § 2243(a) criminalized sexual acts with a victim who was at least 12 but less than 16 years old, where the offender was at least four years older. The Amber Hagerman amendments expanded each section's reach to cover the other's range as well, in specific federal jurisdictional circumstances, and harshened the penalties associated with the former offense. Pub. L. No. 104-208, div. A, § 121 subsec. 7, 110 Stat. 3009, 3009-31; *see id.* (providing for life sentence for violations of § 2241(c), or the death penalty for repeat offenders). If Congress had previously been unclear as to whether § 2243(a), titled "sexual abuse of a minor," covered victims both under 12 and at least 12 but not yet 16 where the requisite age difference was present, the amendment eliminated any ambiguity.[3]

At the same time Congress amended the INA to establish that a conviction for "sexual abuse of a minor" would be a mandatorily deportable offense under 8 U.S.C. § 1101(a)(43)(A), it also refined the definition of that same term in the Sexual Abuse Act to cover cases of sexual abuse where the victim was under 12 years old, or at least 12 years old but under 16 and at least four years younger than the abuser. *See* 142 Cong. Rec. 26,636 (1996) (statement of Sen. Hatch) (praising Amber Hagerman Act as an "important measure in this omnibus bill").[4] Congress's simultaneous consideration

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[3] As the Department of Justice observed, these amendments created some overlap between the two provisions. *See* U.S. Dep't of Justice, *Crim. Resource Manual* § 2467, *available at* https://www.justice.gov/usam/criminal-resource-manual (last visited Dec. 23, 2016).

[4] The Amber Hagerman Act referred to the amended 18 U.S.C. § 2241(c) (titled "Aggravated sexual abuse ... with children") as "aggravated sexual abuse of a minor." Pub. L. No.

of these two laws using precisely the same term shows that Congress intended for the two provisions to have the same meaning, and to address the same conduct, across the federal criminal law and the INA. *See Lewis* v. *United States*, 445 U.S. 55, 63 (1980) (finding informative the treatment of analogous statutory text passed contemporaneously in the same omnibus statute); *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979) ("The package of statutes of which Title IX is one part also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy.").

Some courts have rejected reading "sexual abuse of a minor" in § 1101(a)(43)(A) as referring to the corresponding offense described in the Sexual Abuse Act on the ground that the phrase "sexual abuse of a minor" appears only in § 2243(a), which now only addresses victims who are at least 12 but under 16, while Congress intended § 1101(a)(43)(A) to be broadly protective. *See, e.g.*, *Esquivel-Quintana* v. *Lynch*, 810 F.3d 1019, 1025-1026 (6th Cir. 2016); *Restrepo* v. *Attorney Gen.*, 617 F.3d 787, 794-795 (3d Cir. 2010). Those decisions ignore, however, that the current, narrower version of § 2243(a) was enacted in 1998—two years after Congress enacted IIRIRA using the same term ("sexual abuse of a minor") just as it was broadening the definition of that term in the federal

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104-208, div. A, § 121, subsec. 7, 110 Stat. at 3009-31. Congress's insistent use of the phrase "sexual abuse of a minor" (or its "aggravated" variant) even where the statute had (and continues to have) a different formal heading strongly suggests that this phrase had a specific and particular meaning to Congress in 1996 when both the INA and the federal criminal law were being amended.

criminal law to also explicitly reach children under 12 years old.[5] The relevant question is what the term meant in the Sexual Abuse Act at the time Congress adopted it in IIRIRA. *See Director, Office of Workers' Comp. Programs, Dep't of Labor* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994); *see also Carcieri* v. *Salazar*, 555 U.S. 379, 388 (2009) (terms in a statute must be construed in accordance with their contemporary meaning). Because, in 1996, § 2243(a)'s definition of "sexual abuse of a minor" reached offenses involving persons younger than 12, and persons at least 12 but under 16 if the perpetrator is at least four years older, these courts' concerns about the breadth of the term are misplaced.[6]

Other courts have held that Congress never meant to refer to the Sexual Abuse Act's age limits in the INA at all, since Congress used the "sexual abuse of a

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[5] *See* Protection of Children from Sexual Predators Act, Pub. L. No. 105-314, 112 Stat. 2979 (1998). *Compare* 18 U.S.C. § 2241(c) (continuing to punish sexual abuse offenses involving victims younger than 12, as well as at least 12 but under 16 where the perpetrator is four years older), *with* 18 U.S.C. § 2243(a) (punishing sexual abuse offenses involving victims who are at least 12 but not yet 16 where the perpetrator is four years older). They also ignore that Congress in 1996 viewed the crime proscribed in § 2241(c) as "aggravated sexual abuse of a minor." Pub. L. No. 104-208, div. A, § 121, subsec. 7, 110 Stat. at 3009-31.

[6] Even if one were to ignore the 1996 inclusion of victims under age 12 in § 2241, the structure of §§ 2241 through 2243 would still make clear that current § 2241(c) supplements § 2243(a) in defining "sexual abuse of a minor." Indeed, in the 1996 amendments to the Sexual Abuse Act, included in the same omnibus legislation as IIRIRA, Congress labeled § 2241(c) as "aggravated sexual abuse of a minor," making clear that Congress saw § 2241(c) as one end of a continuum with § 2243(a) covering the range of "sexual abuse of a minor" conduct. Pub. L. No. 104-208, div. A, § 121, subsec. 7, 110 Stat. at 3009-31.

minor" terminology in § 1101(a)(43)(A) instead of explicitly cross-referencing a statute, as it did in other sections of § 1101(a)(43). *See, e.g., Rangel-Perez* v. *Lynch*, 816 F.3d 591, 596 (10th Cir. 2016). That is immaterial. Explicitly cross-referencing the age limits of the Sexual Abuse Act would not have made sense at the time Congress added "sexual abuse of a minor" as an aggravated felony in the INA. Sections 2241(c) and 2243(a) contain federal jurisdictional elements, which would not have been part of the corresponding state offenses. *See, e.g.*, 18 U.S.C. § 2241(c) (1996) ("Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years[.]"); *id.* § 2243(a) (1996) ("Whoever ... in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act" with another person at least 12 years old but under 16 who is "at least four years younger[.]"). While today it is clear that a cross-reference to a federal statute to define a state crime for purposes of the categorical approach does not include mere jurisdictional elements, *see Luna Torres* v. *Lynch*, 136 S. Ct. 1619 (2016), that principle had not yet been established in 1996. Thus, the sensible thing at the time was for Congress to use the term "sexual abuse of a minor" rather than to cross-reference the provisions of the Sexual Abuse Act establishing the federal offense's age limits.[7]

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[7] Moreover, the requirement in § 2241(c) that the defendant "cross[] a State line" is not merely jurisdictional; it substantively narrows the federal offense and distinguishes it from state analogs. Petitioner in *Luna Torres* did not, however, make a

C. 18 U.S.C. § 3509 Has No Bearing On The INA's Definition Of "Sexual Abuse Of A Minor"

As the foregoing makes clear, Congress intended the INA to incorporate the meaning of "sexual abuse of a minor" as used in the Sexual Abuse Act, with its attendant limitations on age and proscribed conduct intact. Interpreting § 1101(a)(43)(A) to incorporate 18 U.S.C. § 3509(a), on the other hand, is insupportable by reference to congressional intent. There is no reference to § 3509 in the legislative history of IIRIRA or any contemporaneous legislative enactment. And the legislative history of § 3509 reveals that Congress in no way contemplated defining the federal offense of "sexual abuse of a minor" when enacting that statute.

Section 3509 was enacted in the Victims of Child Abuse Act of 1990, which established "special procedures to protect child victims and witnesses in court." H.R. Rep. No. 101-681, at 165 (1990); *see also id.* at 41 ("§ 3509. Special procedures applicable to child witnesses and victims"). The Act aimed to ensure that "a court-appointed special advocate shall be available to every victim of child abuse or neglect in the United States that needs such an advocate," Pub. L. No. 101-647, tit. II, § 216, 104 Stat. 4789, 4792, 4794 (1990), and "to provide expanded technical assistance and training to judicial personnel and attorneys, particularly personnel and practitioners in juvenile and family courts, to improve the judicial system's handling of child abuse and neglect cases," *id.* § 221(b), 104 Stat. at 4797. To those ends, it authorized grants for attorney

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particularized argument that the requirement was substantive. *See Luna Torres*, 136 S. Ct. at 1634. Even under *Luna Torres*, then, it is not clear that Congress would have included in the aggravated-felony provision any express cross-reference to this criminal statute.

assistance and training and for closed-circuit televising of the testimony of child-abuse victims. *Id.* §§ 213-214, 104 Stat. at 4793-4794. No provisions of the Act concern substantive criminal offenses or immigration law.

Congress could have connected § 3509 to criminal offenses or immigration law if it wanted to; indeed, it was contemplating changes to both at the time. The Victims of Child Abuse Act was enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647, 101 Stat. 4789. In early iterations, the Crime Control Act included a new substantive criminal offense, *see* H.R. Rep. No. 101-681 at 21, 71 (proposing new computer-hacking offense), and amendments to the definition of "aggravated felony" in the INA, *see id.* at 33-34, 147. Indeed, the proposed INA amendment concerned § 1101(a)(43)(A) itself; it would have added state and federal drug-trafficking to that subsection. *See id.* at 33. But that was the only change to § 1101(a)(43)(A) that Congress considered in the Crime Control Act. Members of the House Judiciary Committee even objected to the Crime Control Act's failure to expand the grounds for deportation of noncitizens convicted of crimes. *Id.* at 338. These members would be surprised indeed to learn that the Crime Control Act would later be interpreted to have done just that—through the Victims of Child Abuse Act, no less.

Congress in no way connected the Victims of Child Abuse Act to the age of consent for federal sexual abuse offenses, deportability, or indeed any substantive criminal or immigration provisions. More to the point, the legislative history of IIRIRA is entirely devoid of reference to § 3509. This is hardly surprising in view of § 3509's purpose to protect victims of child abuse from the trauma of testifying before their alleged assailants.

Congress found that, when prosecuting child-abuse cases, "too often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced." Pub. L. No. 101-647, § 211, 104 Stat. at 4792. Because of this, "for many children, the [trial] itself can become a second trauma" or a "potential second assault." H.R. Rep. No. 101-681, at 166. In response, the Victims of Child Abuse Act "helps the people who are really the most vulnerable in our criminal justice system ... [by] sort of put[ting] its arms around that child and help[ing] that child through the criminal justice system." 136 Cong. Rec. 36,928 (1990) (statement of Rep. DeWine).

That goal has nothing to do with the offense at issue in this case, engaging in consensual sexual intercourse with someone below the age of consent. The conduct this offense prohibits is consensual. *See United States* v. *Rangel-Castaneda*, 709 F.3d 373, 377 (4th Cir. 2013); *see also* H.R. Rep. No. 99-594, at 7, 16 (defining this conduct as consensual and defining the offense in § 2243 as consensual). When a 16-year-old has consensual sex with a 20-year-old, or a 17-year-old with a 21-year-old, the law does not need to protect against a "second trauma" or "second assault." H.R. Rep. No. 101-681, at 166. Consensual sexual acts were self-evidently not considered when Congress aimed to prevent a child victim from coming face to face with his "physical tormentors." 136 Cong. Rec. 36,930 (statement of Rep. Edwards). A provision intended to protect victims of trauma is unrelated to an offense whose victims acted consensually.

It makes no sense, therefore, to import § 3509(a)'s age limit (18) into the federal "sexual abuse of a minor" offense. *Cf. Judulang* v. *Holder*, 132 S. Ct. 476, 485

(2011) (finding arbitrary and capricious an interpretive approach that was not "tied, even if loosely, to the purposes of the immigration laws" at issue). The legislative history shows that Congress considered two ages for eligibility for § 3509's procedural protections, 15 and 18. *See* H.R. Rep. No. 101-681, at 169 (defining "child" as "an individual under the age of 15 years" and "those individuals up to age 18 who are known to be of a developmental age of 15 years"). Had Congress been contemplating an age limit applicable to the age of consent, it would not have considered an age lower than that in all but a handful of states.

There is likewise no reason to think that the age Congress ultimately established—an age higher than the age of consent in almost all jurisdictions—was intended to define the federal age of consent. Congress's considerations with respect to age in § 3509 were simply different than those relevant to § 1101(a)(43)(A). Congress thought that the experience § 3509 targeted—testifying before one's assailant—could be traumatizing regardless of age. *See* 136 Cong. Rec. 36,928 (statement of Rep. DeWine) ("[E]ven to an adult many times, [this] is a very sterile, very tough situation."). Only safeguards for children, however, are constitutionally permissible. *See id.* at 36,930 (statement of Rep. Edwards) ("[T]hese extraordinary exceptions to the constitutional right to face-to-face confrontation [are designed] ... only to protect children from the trauma of confronting their alleged physical tormentors."); *cf.* *Maryland* v. *Craig*, 497 U.S. 836, 855 (1990) (upholding confrontation exception only because "protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important"). Setting the age at 18 may have involved constitutional considerations unrelated to consent rather than an arguably relevant

policy choice. Whatever Congress's reasons for § 3509(a)'s age limit, they had nothing to do with establishing the age of consent.

II. Defining "Sexual Abuse Of A Minor" By Reference To The Federal Criminal Law Avoids The Vagueness Concerns Raised By The BIA's Approach

Defining the aggravated felony of "sexual abuse of a minor" by reference to the federal criminal law would avoid the unconstitutional vagueness concerns implicated by the approach taken by the Board of Immigration Appeals and endorsed by the court below.

In order to comport with the Constitution's guarantee of due process, a criminal statute must "provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). A statute that is so vague that it fails to provide fair notice or invites arbitrary enforcement is void for vagueness. *See, e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015) (finding residual clause of Armed Career Criminal Act void for vagueness); *see also Jordan* v. *De George*, 341 U.S. 223, 231 (1951) (applying vagueness doctrine to immigration law "in view of the grave nature of deportation").

Reading the aggravated felony of "sexual abuse of a minor" to refer to the offense of the same name in the federal criminal law provides such notice, both of the relevant age limits and of the specific forms of prohibited sexual conduct.[8] By contrast, the BIA's

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[8] Indeed, amici's interpretation should be favored because its single definition of "sexual abuse of a minor" eliminates the need to litigate a range of issues related to the meaning of "sexual abuse."

approach to interpreting and applying the term—rejecting its criminal-law definition as too restrictive and adverting to § 3509(a) not as a definition but rather as a mere guide to be applied on a case-by-case basis—provides those charged with or convicted of potentially covered offenses with virtually no indication of whether their convictions would render them deportable and ineligible for relief. *See McDonnell* v. *United States*, 136 S. Ct. 2355, 2373 (2016) (avoiding the potentially vague "standardless sweep of the Government's reading" by adopting a "more constrained interpretation" of a statute) (internal quotation marks and citations omitted).

A. The BIA Has Not Offered Or Adopted A Definition Of "Sexual Abuse Of A Minor"

When first confronted with the term "sexual abuse of a minor," the BIA elected not to define it. *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 993 (B.I.A. 1999). Although it acknowledged the potential relevance of the federal criminal provisions at 18 U.S.C. §§ 2241-2244 and the victim-protection statute at 18 U.S.C. § 3509, the BIA did not think any of those provisions defined "sexual abuse of a minor." *Id.* ("Congress did not provide a definition of the term 'sexual abuse of a minor.'"). Instead, the BIA rejected the criminal provisions as "too restrictive" and deemed § 3509(a) merely "a useful identification of the forms of sexual abuse." *Id.* at 995. The BIA accordingly decided to "invoke [§ 3509(a)] as a guide in identifying the types of crimes [it] would consider to be sexual abuse of a minor," but expressly did "not adopt[] this statute as a definitive standard or definition." *Id.* at 996. Nor did the BIA then provide its own definition; it simply concluded that the crime at issue in that case, indecent

exposure to a child, "is clearly sexual abuse of a minor within the meaning of" § 1101(a)(43)(A). *Id.*

The BIA has not resolved this indeterminacy since. The BIA's decision in *In re V-F-D*, 23 I. & N. Dec. 859 (B.I.A. 2006), continued to use § 3509(a) as a guide without adopting it as definitive. And the BIA's decision in this case, *In re Esquivel-Quintana*, 26 I. & N. Dec. 469 (B.I.A. 2015), relied on *Rodriguez-Rodriguez* and *V-F-D* to hold that it must "define 'sexual abuse of a minor' under the Act on a case-by-case basis." The BIA thus left § 1101(a)(43)(A) undefined. *See Larios-Reyes* v. *Lynch*, __ F.3d __, 2016 WL 7099825, at *8 (4th Cir. 2016) (declining to defer to BIA for failure to adopt a federal definition of "sexual abuse of a minor"); *Rangel-Perez*, 816 F.3d at 597-599 (observing *Rodriguez-Rodriguez* did not define "sexual abuse of a minor" in § 1101(a)(43)(A)); *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1157-1158 (9th Cir. 2008) (en banc) (same); *cf. Velasco-Giron* v. *Holder*, 773 F.3d 774, 780-781 (7th Cir. 2014) (Posner, J., dissenting) (same).

The BIA's approach does not offer fair notice of what actions fall within that prohibition. Rather than define the term "sexual abuse of a minor" or any of its elements, the BIA concluded that the statutory definition could vary from case to case. This moving target does not provide fair notice or prevent arbitrary enforcement. Such indeterminacy raises a serious risk of unconstitutional vagueness.

B. Adopting § 3509(a) Does Not Resolve Constitutional Vagueness Concerns

Despite express language to the contrary, some courts interpret *Rodriguez-Rodriguez* to adopt § 3509(a) as the BIA's definition of "sexual abuse of a

minor." *See, e.g.*, *Restrepo*, 617 F.3d at 795-796; *Gaiskov* v. *Holder*, 567 F.3d 832, 835 (7th Cir. 2009); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 57-60 (2d Cir. 2001). Tethering the aggravated-felony definition of "sexual abuse of a minor" to § 3509(a) would not allay these well-founded vagueness concerns.

Section 3509(a) is not a substantive criminal statute. It does not define the elements of any offense, and thus does not provide those charged with or convicted of related offenses with notice of what conduct is and is not prohibited. Indeed, no definition of "sexual abuse of a minor" is at all readily discernible from § 3509(a), a statutory provision that comprises twelve definitions and many subdivisions. The BIA has provided no assistance in clarifying things. The only subdivision the BIA mentions in *Rodriguez-Rodriguez* is § 3509(a)(8), which states that "sexual abuse" "includes" certain activities (which are set forth further in § 3509(a)(9)'s definition of "sexually explicit conduct"). Neither the definitions collected in § 3509(a) nor the nonexclusive list of conduct in § 3509(a)(8) can be reasonably interpreted to comprise the elements of a criminal offense.

Section 3509(a) is an especially poor vehicle for defining "sexual abuse of a minor" in the context of consensual sexual conduct. Because the prohibited act is consensual, the offense is defined by two critical elements: the ages of the victim and the perpetrator. *See, e.g.*, 18 U.S.C. § 2243(a); Model Penal Code § 213.3(1)(a); Cal. Penal Code § 261.5(c). But § 3509(a) defines "child" as someone under 18, and makes no other mention of age. *See* 18 U.S.C. § 3509(a)(2). It does not mention an age range between perpetrator and victim, nor does it indicate that otherwise legal

conduct might be criminal when performed between parties of sufficiently disparate ages.

Relying on § 3509(a) to define what consensual sexual conduct constitutes "sexual abuse of a minor" therefore leads to one of two results, the first of which Congress could not have intended and the second of which leaves vagueness concerns unresolved.

First, "sexual abuse of a minor" could refer to sexual conduct with a person under 18 regardless of the perpetrator's age. Although this offense would be clear, it cannot be what Congress intended. Under this reading, a person who turned 18 on Monday and had consensual sex on Tuesday with someone turning 18 on Wednesday has committed the aggravated felony of sexual abuse of a minor, and is deportable and ineligible for discretionary relief. Two 17-year-olds having consensual sex the day before their 18th birthdays have committed the aggravated felony of sexual abuse of a minor. A 17-year-old having consensual sex with a 16-year-old has committed the aggravated felony of sexual abuse of a minor—and so has the 16-year-old. Congress cannot have intended these absurd consequences of defining "sexual abuse of a minor" by reference to § 3509(a)'s age limit.

Second, an age discrepancy might still be required—just not as defined by § 3509(a), which is silent on the point. But the Constitution requires fair notice of what that age discrepancy is. The BIA has said only that the age differential must be "meaningful." *In re Esquivel Quintana*, 26 I. & N. Dec. at 475-476. The BIA did not quantify meaningfulness, except to say in this case that the three-year age differential was sufficient because the state statute punished sexual acts involving 16- and 17-year-olds.

See id. at 475. Going forward, however, the BIA concluded that it must "evaluate[] statutes individually and define 'sexual abuse of a minor' under the Act on a case-by-case basis." *Id.* at 476. Under this approach, noncitizens charged with or convicted of state offenses prohibiting consensual sexual conduct between people of certain ages cannot know where the BIA would draw the line until the BIA considers their statute of conviction, and thus have insufficient notice of whether their state convictions will qualify as aggravated felonies even if the BIA nominally relies on § 3509(a).

Because neither the BIA's decisions nor reliance on § 3509(a) offers a definition of "sexual abuse of a minor" that adequately allays serious constitutional concerns, *see Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001), the Court should interpret § 1101(a)(43)(A) by reference to the federal criminal law—which, as shown above, is the result Congress intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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